Office of the Commissioner
MAJOR LEAGUE BASEBALL

July 25, 1991

The Honorable Bill Hughes
341 Cannon House Office Building
Washington, DC 20510-3002

Dear Congressman Hughes:

The Copyright Royalty Tribunal ("CRT") recently ruled that the copyright owners of network television programs (such as the World Series, All-Star Game and Game-of-the-Week) are entitled to share in the satellite carrier royalty fund established by Section 119 of the Copyright Act. See 56 Fed. Reg. 20,414 (May 3, 1991). Major League Baseball supports that ruling and strongly opposes the efforts of the Motion Picture Association of America ("MPAA") to overturn the ruling legislatively.

I.

We have reviewed the July 10, 1991 letter from Fritz Attaway of the MPAA to you, contending that the CRT misinterpreted Section 119. Mr. Attaway's analysis of the issue is incorrect in several respects.

First, Section 119(b)(3) plainly states that the Section 119 royalties shall be distributed to "those copyright owners whose works were included in a secondary transmission" made by the satellite carrier. There is nothing in that language to suggest that copyright owners of network programming are ineligible for compensation under Section 119.

Second, although not mentioned in the MPAA letter, Section 119(b)(3) represents a clear departure from the language which Congress used in Section 111 of the Copyright Act, dealing with the cable compulsory license. The drafters

of Section 119 tracked much of the Section 111 language. However, they did not adopt the language of Section 111(d)(3), which specifically excludes network programming from Section 111 compensation. In our view, and that of the CRT, Congress' decision not to adopt in Section 119 the Section 111(d)(3) exclusionary language reflects a deliberate intent not to deny Section 119 compensation to copyright owners of network programming.

The different treatment of network programming in Sections 111 and 119 relates to the difference in the compulsory licensing rights afforded by the two provisions. Congress determined in Section 111 that cable operators should not incur copyright liability for retransmitting network programs because "the copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976) (emphasis added). In contrast, Section 119 allows satellite carriers to retransmit network programs only in those areas that are "unserved" by the networks. See 17 U.S.C. § 119(a)(2)(B). Because copyright owners (such as Baseball) are not compensated by the networks for such "white areas," it was perfectly appropriate for Congress in Section 119 to require compensation from the satellite carriers.

Third, MPAA places principal reliance on a passage from a report of the House Energy and Commerce Committee that accompanied the Section 119 amendment to the Copyright Act. As you well know, Mr. Chairman, copyright jurisdiction resides in the Judiciary Committee.

The House Judiciary Committee also released a report which accompanies Section 119. The Commerce Committee passage on which the MPAA relies is not contained in that report. Indeed, there is nothing in the Judiciary Committee report that supports MPAA's reading of Section 119. It is perhaps not surprising, therefore, that MPAA's letter to you makes no reference whatsoever to the report of your Committee.

Fourth, the MPAA also contends that network programming must be ineligible for Section 119 compensation because satellite carriers pay less for network stations than for independent stations. This argument improperly confuses the payment schedule in Section 119 with royalty entitlement.

Section 119(b)(1)(B) requires satellite carriers to pay 12 cents per subscriber per month for each independent signal retransmitted, and 3 cents for each network signal. As the House Judiciary Committee report explained, this payment

schedule was adopted to ensure that satellite carriers pay essentially the same level of compulsory licensing fees that their competitors, cable operators, pay under Section 111. See H.R. Rep. No. 887 (Part I), 100th Cong., 2d Sess. 22 (1988). There is nothing in the language of Section 119 or in your Committee's report suggesting that the Section 119(b)(1)(B) payment schedule precludes copyright owners of network programming from seeking royalty compensation under the separate provision of Section 119(b)(3).

Furthermore, although not mentioned by the MPAA, there is precedent for the fact that Congress' intent to attach different "price tags" to particular classes of signals does not equate with an intent to exclude from compensation any particular category of programming on such signals. The CRT previously ruled that all programming on PBS and other noncommercial educational signals is eligible for Section 111 compensation -- notwithstanding that the Section 111 royalty payment for educational stations is one-quarter of the payment for independent stations. See 45 Fed. Reg. 63026, 63033 (1980). Adoption of MPAA's "price tag" argument would thus require reexamination of a ruling that has resulted in substantial royalties flowing to PBS over the past decade.

II.

Baseball agreed not to oppose enactment of Section 119 despite our strong opposition to compulsory licenses of the type set forth in that section. In reaching that position, we took account of the fact that (among other things) the language of Section 119(b)(3) plainly provides that copyright owners of all programs (network and non-network) are eligible for Section 119 compensation. We continue to believe that Baseball should receive fair compensation from satellite carriers, which profit from the retransmission of our games into geographic areas for which we are not compensated by the networks.

We agree that there are Copyright Act compulsory licensing issues that may warrant Congressional oversight. For example, we firmly believe that there is no justification for perpetuating the Section 111 cable compulsory license. We also are concerned about the market distortions resulting from MPAA's having been awarded in past CRT distribution proceedings an excessive share of Section 111 royalties -- an award made at the direct expense of Baseball and other sports interests.

However, we see no basis for disturbing the CRT's ruling on the Section 119 network issue. Each of the arguments advanced in Mr. Attaway's July 10, 1991 letter to you was carefully considered and properly rejected by the CRT. The CRT's ruling is both equitable and fully consistent with the Copyright Act.

We appreciate your consideration of our views on this matter. Please let me know if you have any questions.

Sincerely yours,

Thomas J. Ostertag
General Counsel

TJO:eeb